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No. 01-1375

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal statutes and regulations control virtually every aspect of surface coal mining on tribal lands, from the creation of leases, approval of mine plans, setting and administration of rentals and royalties, and supervision of reclamation activities, to final bond release. The basic purpose of the statutory scheme is to maximize tribal revenues from reservation lands. The question presented is:

Whether the Court of Appeals properly held that the United States may be liable in damages to the Navajo Nation when the Department of the Interior, in exercising its control over the leasing process, violated several specific trust duties imposed by the Indian Mineral Leasing Act and its implementing regulations and deliberately abused its comprehensive management authority to minimize Navajo revenues in favor of a politically powerful coal company with ties to the Secretary.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Navajo Nation respectfully urges that the Government's Petition be denied. The judgment below is entirely consistent with this Court's precedents, the lower courts are in harmony on the legal issues, and a decision on these facts would have no general applicability.

TREATY, STATUTES, AND REGULATIONS INVOLVED

The following treaty, statutes, and regulations reveal the comprehensive nature of federal control over the leasing of Navajo coal and provide the contours of the Government's trust duties: the Treaty between the United States of America and the Navajo Tribe of Indians, 9 Stat. 574 (1849); the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, and implementing regulations, 25 C.F.R. Parts 211 and 216, Subpart A and 43 C.F.R. Part 3480; the 1948 Indian right-of-way statute, 25 U.S.C. §§ 323-328, and implementing regulations, 25 C.F.R. Part 169; the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. §§ 1701-1757, and regulations applying FOGRMA requirements to Indian coal, 30 C.F.R. § 206.450 *et seq.* and 25 C.F.R. § 211.40 (applying 30 C.F.R. Parts 201-243, 290); section 710 of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1300, and implementing regulations, 25 C.F.R. Part 216, Subpart B, and 30 C.F.R. Parts 750 and 955; and federal mine safety laws applicable to coal mining on tribal lands, 30 U.S.C. § 551 *et seq.* and 30 U.S.C. § 802 *et seq.*; *see* 30 C.F.R. Parts 50, 56, 71-72, 74, 77, 90, 100, 880. These provisions are set forth in the Addendum lodged

with the Court, except for the voluminous, generally applicable, mine safety laws and regulations.

STATEMENT OF THE CASE

This case involves a unique set of unrebutted facts. In 1964 the Department of the Interior negotiated, drafted, and approved a coal lease between the Navajo Tribe and a subsidiary of the Peabody Coal Company. The lease called for royalties of 20¢ to 37.5¢ per ton. C.A. App. A281. After Congress mandated in 1976 that royalties for federal coal equal or exceed 12½% of value, *see* 30 U.S.C. § 207(a), the Department recognized that the lease was inequitable and that it had a duty to rectify the inequity. *E.g.*, C.A. App. A364, A379. The lease itself offered that opportunity, granting the Secretary unilateral authority to adjust the royalty rate to a reasonable level in 1984. *Id.* at A284.

The Tribe engaged in fruitless negotiations with Peabody from 1979 to 1984. In early 1984, Tribal Chairman Peterson Zah requested the Secretary to adjust the royalty rate. *Id.* at A375. The Secretary delegated that responsibility to the Navajo Area Office of the Bureau of Indian Affairs ("BIA"). *Id.* at A379. The Navajo Area Director obtained analyses from the Bureau of Mines ("BOM") and the BIA Energy & Minerals Office ("E&M"). BOM recommended a royalty rate adjustment to 20%; E&M to 24%. *See id.* at A437. Relying on the lower BOM recommendation, the Area Director notified Peabody in June 1984 that he was adjusting the royalty rate to 20% and that Peabody had a right to appeal under the Department's formal appeal procedures. *Id.* at A438.

Peabody appealed to the Commissioner of Indian Affairs, then John Fritz, who also held the positions of Deputy Assistant Secretary and Acting Assistant Secretary for Indian Affairs. Fritz indefinitely stayed the royalty adjustment during the appeal, *id.* at A453, causing the Navajo to lose an estimated $50,000 per day while the appeal languished, *id.* at A397. Peabody and its utility customers instructed counsel to "proceed[ ] on maximum delay mode in the appeal." *Id.* at A452. The parties completed briefing in early 1985, and Fritz then obtained new, more detailed, studies from BOM and the BIA's own experts. *See id.* at A649-714. All federal studies determined that the 20% rate was proper, *see id.* at A714; no study found otherwise, *id.* at A1864.

Fritz sought to make his decision a model of procedural fairness and technical competence. *Id.* at A1230-32. Fritz, his staff, and his solicitor prepared a final decision for the Department, going over it line-by-line. *Id.* at A1245-46. The decision document was finalized, typed on BIA letterhead, copied, and checkmarked for distribution to counsel of record in the administrative appeal. *Id.* at A717-722. It was, in Fritz' words, "teed up" for his signature after he returned from military reserve duty. *Id.* at A1245.

The Department leaked the pending decision to Peabody, but not the Navajo. *E.g.*, *id.* at A1089-90; *see* Pet. App. 41a-42a. Peabody immediately hired Stanley Hulett, a "close personal friend" of Secretary Hodel, to seek *ex parte* the suppression of the decision. Pet. App. 40a. Then, "[o]n or shortly after the date of the *ex parte* meeting, Secretary Hodel signed a memorandum prepared by Peabody . . . instruct[ing] Mr. Fritz not to issue the appeal

decision affirming the twenty percent rate."[1] Pet. App. 40a-41a; C.A. App. A746-49, A764.

The Department immediately notified Peabody of the success of its *ex parte* campaign–both Hodel and Fritz met with Hulett at lease twice–but concealed it from the Navajo. *Id.* at A746; Pet. App. 41a, 46a. An Associate Solicitor discovered what Secretary Hodel had done and warned of various consequences if the Navajo learned the truth. C.A. App. A771-72. The Department then "misinformed" the Navajo. Pet. App. 41a. Because of the Department's dishonesty, "the Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." Pet. App. 51a-52a.

Peabody reiterated its longstanding offer to raise the royalty rates for its coal leases to 12½% shortly thereafter. The Tribe rejected Peabody's offer in July 1986. *See* C.A. App. A929, A1041. However, during the two and one-half years of negotiations after Secretary Hodel secretly scuttled Fritz' decision, the Navajo continued to receive negligible royalties. The Department knew the Navajo would get "beat up" in the negotiations, *id.* at A1644, A1263-64; continued to conceal from the Navajo

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[1] The Government's claim that Hodel signed the memo prepared by Peabody's lawyers to "request" Fritz not to issue the decision, Pet. at 13, is euphemistic at best. As the former Director of the Office of Trust Responsibilities testified, "you would have to be brain dead not to understand what this is telling you." C.A. App. A1648. Similarly, notwithstanding the Government's attempt to find a regulation that might justify Hodel's actions, *see* Pet. at 7 n.4, 24, Hodel did not direct Fritz to "reconsider" his decision; rather, he secretly "assume[d] personal jurisdiction" over the case, and told Fritz to "stop action." C.A. App. at A1253.

both the *ex parte* deal and the new federal studies supporting the 20% royalty rate, *see id.* at A784, A1026-27, A1283-84; and violated its own regulation designed to prevent overreaching by companies negotiating with Indians. *See* 25 C.F.R. § 211.2 (1985) (prohibiting mineral lease negotiations unless desired by the Indians and generally restricting any negotiations to thirty days); C.A. App. A839. Instead, the Department actively assisted *Peabody* in *its* negotiation strategy. *See id.* at A778.

Predictably, facing "severe economic pressures," Pet. App. 3a, the Navajo eventually agreed to Peabody's proposal reducing the effective royalty rate to even less than the federal minimum.[2] Moreover, contrary to the Government's assertion, Pet. at 7-8, other provisions of the "negotiated" lease amendments substantially harmed Navajo interests. For example, the amendments eliminated the "extremely valuable" provision for future Secretarial adjustment, *see id.* at A800-01 (abrogating Article VI of the original lease), A988; required the Navajo to forfeit $89 million in back royalties and taxes,[3] Pet. App. 44a; capped future taxes, confirmed old tax waivers[4] and

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[2] Contrary to the Government's representations, accepted by the Court of Federal Claims, *see* Pet. at 11, the Navajo Nation alleged and proved on unrebutted facts that the effective royalty rate of the "negotiated" lease amendments was less than the federal minimum of 12½%. C.A. App. A107, A120, A124, A1973, A2058, A2796.

[3] The Department knew that the Navajo "gave up something for nothing" here. C.A. App. A2865.

[4] Because of a pre-existing tax waiver on coal destined for the Navajo Generating Station, which consumes over half of the Peabody coal, the *total* of Navajo taxes and royalties for that coal cannot exceed 12½% under the lease amendments, much less

granted new tax waivers, C.A. App. A805-10; and leased an additional 90 million tons of Navajo coal for insubstantial bonuses and at the facial 12½% royalty rate, not the 20% rate that all federal studies had found reasonable, *id.* at A795, A1550-52, A1857. The Government notes that the royalty rate of a second inequitable lease of coal jointly owned by the Navajo and Hopi was also adjusted to 12½%, Pet. at 8, but the amendments to that lease only damaged the Navajo further. As Peabody and its customers recognized, if the 20% rate were affirmed for the Navajo lease, the royalty rate of the other lease would inevitably rise to that figure. *See id.* at A740; A1072-73. Ironically, at the same time the Department was working with Peabody to minimize Navajo royalties below the 12½% federal minimum, it required Peabody to pay a 17.08% royalty for inferior federal coal. *Peabody Coal Co.*, 93 IBLA 317 (1986).

Federal law requires that any tribal mineral lease be approved by the United States, to protect Indians from unfair transactions. The process required by IMLA for Secretarial approval therefore requires an economic analysis to determine if it were in the Tribe's best interest. However, Secretary Hodel had committed privately to Peabody to approve the deal without any economic analysis. C.A. App. A847. The approval process was thus described by the Director of the Office of Trust Responsibilities as follows: "And my shop, what are we doing? We can't help, because we are not supposed to help. . . . [I]f you tell me I can't respond as a Trustee, then what is my review? And that's why we have no review . . . [T]he

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approach the 20% figure found by the Department to be proper compensation for the coal alone. C.A. App. A1972-76.

way this happened was, we were rubber stamping a review of a bunch of [lease] amendments that we weren't supposed to review." *Id.* at A1659-61. The Director "refused to sign his approval because he felt he 'would be participating in a breach of trust.' " Pet. App. 45a (quoting deposition testimony).

Thus, Peabody submitted the lease amendments directly to Secretary Hodel's office, and their approval became a "rush job" within the Department. C.A. App. A1876. Hodel approved the lease amendments via a document partially drafted by Peabody, based on the recommendation of Assistant Secretary Ross Swimmer *also* drafted in part by Peabody. *Id.* at A1877-82. No economic analysis or study of any kind was included in the package sent to Hodel by Swimmer.[5] *Id.* at A2061, 2725.

From the exhaustive studies performed by the Bureau of Mines and others, the Department was well aware that the Navajo's extraordinarily valuable coal should have commanded a royalty rate of at least 20% and it had the opportunity to impose that rate at all times from 1984 to 1987. This case involves no Navajo "second-guess[ing]" and requires no "benefit of hindsight," as the Government suggests. Pet. at 18, 27. It concerns the intentional subversion of Navajo interests by its faithless trustee, which knew at the time it approved the sub-12½% deal that the proper royalty was at least 20%.

This suit was filed in 1993. Until the Government's first trial attorney was removed from this case after being found to have intentionally obstructed justice in another

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[5] A rushed "technical review" prepared by the BIA was shelved, its author having been given insufficient information to form a reasoned opinion. *See, e.g.*, C.A. App. A959, A963. Had the reviewer been informed of the facts, he would have recommended disapproval. *Id.* at A998-1006.

case involving Navajo coal, *see Mescal v. United States*, 161 F.R.D. 450 (D.N.M. 1995), the Government continued to conceal the facts even during discovery in the trial court in this case. The full extent of its misconduct was discovered only in 1997, when Peabody was forced to produce a document that *it* had concealed in violation of court orders and agreements of counsel. *See Navajo Nation v. United States*, 46 Fed. Cl. 353, 354 (2000), *aff'd*, 2001 WL 312117 (Fed. Cir. May 29, 2001).

DECISIONS BELOW

The Court of Federal Claims was outraged by the Department's conduct, but, focusing only on the Department's collusion with Peabody, held that it lacked jurisdiction to provide a remedy. "Let there be no mistake. Notwithstanding the formal outcome of this decision, we find that the Secretary has indeed breached these basic duties [of loyalty, care, and candor]. There is no plausible defense for a fiduciary to meet secretly with parties having interests adverse to those of the trust beneficiary, adopt the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead the beneficiary concerning these events." Pet. App. 49a. The "formal outcome" was premised on the court's *sua sponte* determination that federal supervision over Indian coal was not comprehensive, contrary to the Government's repeated concession in that court. *See* C.A. App. A2108, A2986.

The Court of Appeals shared the trial court's outrage, *see* Pet. App. 11a-12a, but reversed on the "formal outcome." It found it "quite clear that the statute and regulations assign to the Secretary of the Interior and other government officials the authorization, supervision, and control of Indian mineral leasing activities." Pet. App.

10a. The Court of Appeals determined that such comprehensive supervision over all aspects of Indian coal leasing gives rise to a correlative federal duty to "manage the mineral resources for the benefit of the Indians." Pet. App. 11a.

The Court of Appeals further determined that the principal statutory purpose to be served by federal management of tribal minerals was to "maximize their benefit to the Indians," Pet. App. 10a, and that the familiar "best interest of the Indians" standard applies to the Departmental actions at issue here. *See* Pet. App. 12a. Having determined that the United States controls and supervises virtually every aspect of Indian coal development and that the Government has a statutory duty to exercise its pervasive control to manage tribal minerals in a way that maximizes revenues and advances Indian interests, the Court of Appeals concluded that "[IMLA] and its regulations are similar to those governing timber resources that were the subject of *Mitchell II*," *United States v. Mitchell*, 463 U.S. 206 (1983). Pet. App. 8a.

The Court of Appeals therefore applied the *Mitchell II* framework. It found that all of the Department's revenue-minimizing activities, from its secret collaboration with Peabody in scuttling a well-supported administrative appeal decision to its rubber-stamp approval of the damaging lease amendments two and one-half years later violated both "common law . . . [and] statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo." Pet. App. 12a.

In a separate opinion, Judge Schall agreed that the Government violated compensable fiduciary duties, but focused on the Secretary's approval of the "negotiated"

lease amendments.[6] In Judge Schall's opinion, the Department's "failure to perform an economic analysis on the Agreement between Peabody and the [Navajo] Nation that was approved by the government under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 . . . amounted to a breach of a fiduciary obligation owed to the Nation." Pet. App. 30a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH *MITCHELL II*.

a. *Mitchell*'s "Control or Supervision" Test

Mitchell II approved the general test stated in *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980), for determining if money-mandating trust duties may exist: " 'where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' " 463 U.S. at 225 (quoting *Navajo Tribe*, 624 F.2d at 987). The Government would apparently substitute an undefined "management" test derived from dictum in *Mitchell I* for the "control or supervision" test actually approved by this Court in *Mitchell II*. *See* Pet. at 17-19.

The Indian plaintiffs in *Mitchell II* sought to recover damages from the United States based on allegations of waste and mismanagement of their timber resources.

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[6] The Government's repeated references to a "divided" court of appeals are misleading. All judges on the panel agreed that jurisdiction was present and that the Department had breached compensable trust duties.

They asserted that the alleged misconduct constituted a breach of fiduciary duty owed them by the United States under various statutes. 463 U.S. at 210. To prevail, the plaintiffs were required to show that the source of substantive law on which they relied–the statutes and regulations under which the United States controlled or supervised the timber resource–could fairly be interpreted as mandating compensation by the Federal Government for damages sustained as a result of a breach of the duties they impose. *Id.* at 219.

The Court examined the timber management statutes, 25 U.S.C. §§ 406, 407, 466, the Indian right-of-way statutes, and implementing regulations–the sources of substantive law on which the plaintiffs relied. *Mitchell II*, 463 U.S. at 219-23. It found that they conferred federal control over "[v]irtually every stage of the process," *id.* at 222, and established a correlative federal "responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary obligations." *Id.* at 224. The Court concluded that, because those "statutes and regulations . . . clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation for damages sustained." *Id.* at 226.

In its Petition, the Government urges both that the governing statutes and regulations must expressly impose "fiduciary *management* duties" in order to create potential liability under *Mitchell II*. Pet. at 21 (emphasis in original). The Government's contention ignores the disjunctive "control or supervision" test adopted in *Mitchell II*, 463 U.S. at 225, and improperly transforms "the

descriptive into the prescriptive." *Brown v. United States*, 86 F.3d 1554, 1559-60 n.6 (Fed. Cir. 1996). As *Brown* explained, "[a]ccording to [*Mitchell II*'s] disjunctive 'control or supervision' test, nearly complete government management (*i.e.*, 'supervision') or control, while more than sufficient to create an enforceable duty, is not necessary." *Id.* at 1560 (citations omitted). The Government's seeming insistence on violations of statutes and regulations that provide a money damage remedy *in haec verba* overlooks the careful wording of *Mitchell II*: the applicable statutes and regulations provide the "contours" of the trust duty. 463 U.S. at 224. While the general contours of the government's obligations may be defined by statute, the interstices are filled in through general trust law.

b. Federal Control or Supervision of Indian Coal Leasing

The Navajo Nation alleged, *e.g.*, C.A. App. A38-39, A117-18, and the Government conceded comprehensive federal control and supervision over Indian minerals in both of its briefs in the Court of Federal Claims.[7]

[7] C.A. App. A2108 ("the Department of the Interior has promulgated comprehensive regulations governing the operation of approved leases–including regulations governing rights-of-way over Indian lands, 25 C.F.R. Part 169 (1985); surface exploration, mining operations and reclamation, 25 C.F.R. Parts 216 (1985) and 200 (1993); and the payment of rents and royalties, 25 C.F.R. Part 211 (1985)"); C.A. App. A2986 ("the Secretary's duties in the administration of mineral leases are admittedly quite comprehensive . . . ").

Inexplicably, that court, *sua sponte*, found that comprehensive federal control of Indian coal was lacking. This *sua sponte* utterance is the only support the Government can muster for its position here that the United States controls or supervises Indian minerals less comprehensively than it does Indian timber. *See* Pet. at 20. The Court of Appeals corrected the Court of Federal Claims on this point. The Government's concession of jurisdictional facts in the Court of Federal Claims, *see supra* n.7, and its express concession in the Court of Appeals that "there is no question that the CFC had subject matter jurisdiction" over this case, Gov. Br. at 2, belie its new position here, that this case "presents a threshold immunity question." Pet. at 14.

Congress has delegated to several federal agencies the power to regulate all aspects of Indian coal leasing and development. These agencies exercise literally daily supervision of all such mining activities.

• *Bureau of Indian Affairs ("BIA")* Congress expressly delegated rulemaking authority to the Secretary in IMLA. 25 U.S.C. § 396d. The Secretary's regulations comprehensively govern coal exploration permits, lease negotiations, bonding, the size and shape of leases, specific terms of mineral leases, approval or disapproval of leases and mining plans, rental and royalty payments, permission to commence mining operations, promulgation and enforcement of "operating regulations" by the Secretary, penalties for noncompliance with provisions of leases and regulations, and lease cancellation. 25 C.F.R. Parts 211 and 216, Subpart A. Pet. App. 9a-10a; C.A. App. A3393.

The IMLA regulations were expressly promulgated to ensure that Indian mineral resources "will be developed in a manner that maximizes their best economic interests" and to be "consistent with the *Federal Government's role as trustee* for these mineral resources and with the modern Federal policy of self-determination." 61 Fed. Reg. 35,634 (1996) (emphasis added). The BIA exercises further control over coal mining operations through authority over rights-of-way. 25 U.S.C. §§ 323-328; 25 C.F.R. Part 169; *see Mitchell II*, 463 U.S. at 223.

• *Bureau of Land Management ("BLM")* IMLA regulations delegate to BLM comprehensive authority over resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification for Indian coal, and incorporate by reference BLM regulations governing coal exploration and mining operations. 25 C.F.R. § 211.4, incorporating 43 C.F.R. Part 3480. In performing these functions, BLM exercises "the *trust responsibility of the United States*." *See* 61 Fed. Reg. 35,634, 35,641 (1996) (emphasis added).

• *Minerals Management Service ("MMS")* In the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757 ("FOGRMA"), Congress required the Secretary to address "the adequacy of royalty management for coal . . . on . . . Indian lands." FOGRMA § 303, codified at 30 U.S.C.A. § 1752, Hist. Notes. The Secretary satisfied the congressional mandate by establishing the Auditing and Financial System in 30 C.F.R. Parts 212 and 218, *see* 49 Fed. Reg. 37,336 (1984), and applying it to solid minerals retroactive to June 1985, *see* 51 Fed. Reg. 15,763, 15,765 (1986); and by adopting the Production Auditing and Accounting System in 30 C.F.R. Part 216, *see* 51 Fed. Reg.

8,168 (1986), under which MMS controls or supervises all aspects of coal valuation and the collection and audit of royalties, *see* C.A. App. A3393. The royalty management regulations were *also* expressly promulgated "to ensure that the *trust responsibilities of the United States* are discharged in accordance with the requirements of the governing leasing laws, treaties, and lease terms." 30 C.F.R. § 206.450(d) (emphasis added).[8]

• *Office of Surface Mining Reclamation and Enforcement ("OSM")* In the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), Congress reaffirmed federal control over Indian coal mining and lease amendments. 30 U.S.C. § 1300. Under regulations promulgated under SMCRA in 1977, OSM issues or denies mining permits on Indian land and oversees compliance by coal operators with requirements concerning post-mining land use, backfilling and grading, spoil disposal, topsoil handling, protection of hydrologic systems, dams and impoundments, revegetation and steep-slope mining. C.A. App. A3393; 25 C.F.R. Part 216, Subpart B (1985). Under additional Indian lands regulations promulgated under SMCRA in 1984, OSM comprehensively regulates permit applications and permitting decisions, exploration, performance standards, bonding, inspections, and enforcement of permit conditions, performance standards, and

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[8] The Government's suggestion, Pet. at 21, that it might have leased Navajo coal for the 10¢ per ton minimum set by a 1957 regulation even if it were aware (as here) that the proper royalty was closer to $4.00 per ton is preposterous. The United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate," to strive for the "ceiling" and not settle for the "floor." *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983).

reclamation requirements. 30 C.F.R. Part 750; C.A. App. A3393. The regulations governing surface coal mining on tribal lands were *also* promulgated to satisfy "the *Department's legal role as trustee* of the natural resources of the Indian tribes." 42 Fed. Reg. 18,083 (1977) (emphasis added). Since 1994, OSM has also administered on Indian lands the provisions of the Coal-Mine Fire Control Act of 1954, 30 U.S.C. §§ 551-558, applicable only to "lands owned or controlled by the United States or any of its agencies." 30 U.S.C. § 554(a). *See* 30 C.F.R. Part 880.

Other federal agencies, such as the Office of Mine Safety and Health Administration and the Environmental Protection Agency, comprehensively regulate coal surface mining operations on Indian lands under more generally applicable laws. *See* C.A. App. A3394.

Even without the special overlay of rules governing Indian coal royalty management and Indian surface coal mining, this Court has observed that IMLA confers comprehensive federal authority over Indian minerals. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) (under IMLA, "the United States has exercised its supervisory authority over oil and gas leases[9] in considerable detail"). In invalidating certain state taxes on mineral production in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court likewise observed that IMLA was "comprehensive legislation" which "detailed uniform leasing procedures designed to protect the Indians." *Id.* at

[9] The unrebutted record here shows that the Government's supervisory control over Indian coal is *more* comprehensive than that over oil and gas. C.A. App. A3392-95.

763. The lower courts are in accord, including one that has scrutinized the mining operation at issue here. *See Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (federal "statutes and regulations govern[ ] virtually every aspect of [Peabody's] coal mining activities, from the creation of its leases to the reclamation of land"). Similarly, in holding that the Department breached trust duties under IMLA by rubber-stamp approvals of well spacing orders, the court in *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv.*, 792 F.2d 782 (9th Cir. 1986), relied on the fact that IMLA "is a detailed and comprehensive act that imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of Indians." *Id.* at 794. It relied on the *en banc* decision of the Tenth Circuit in *Jicarilla Apache Tribe v. Supron Energy Corp.*,[10] which held that the Department had violated trust duties under IMLA by failing to invoke a lease provision that would have resulted in greater royalties to the tribe than an alternative set of regulations. In so deciding, the *Supron* court found that, under IMLA, "the federal government's role in mineral leasing is pervasive and its responsibilities comprehensive," 728 F.2d at 1564, and that IMLA "regulations detail in exhausting thoroughness the government's management and regulatory responsibilities," *id.* at 1565.

As in *Mitchell II*, both IMLA and its implementing regulations expressly require the Government to act in the best interest of the Indians. *See* 25 U.S.C. § 396b, 25

[10] 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring and dissenting), *on reh'g*, 782 F.2d 855 (*en banc*) (adopting concurring and dissenting opinion as modified), *supplemented*, 793 F.2d 1171, *cert. denied*, 479 U.S. 970 (1986).

C.F.R. §§ 211.1(a), 211.3 (2001); *see Blackfeet Tribe*, 471 U.S. at 764 (IMLA's "leasing procedures [are] designed to protect the Indians."); *Kenai Oil & Gas, Inc. v. Dep't of the Interior*, 671 F.2d 383, 387 (10th Cir. 1982);[11] *Pawnee v. United States*, 830 F.2d 187, 190 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The Department's Indian coal leasing policy, adopted in 1975, also expressly requires it to act in the best interest of the Indians. C.A. App. A332.

Even if the Court were to adopt the novel "full management" test proposed by Petitioner, the IMLA regime would plainly satisfy it. The courts uniformly agree with the court below, Pet. App. 10a, that IMLA *does* impose management duties on the Federal Government, in addition to other duties expressly set forth in particular provisions of IMLA and its implementing regulations. For example, the court in *Kenai* invalidated a Departmental approval decision not in the interest of the Indians, reasoning that, as trustee under IMLA, the Secretary "must *manage* Indian lands so as to make them profitable for the Indians." 671 F.2d at 386 (emphasis added). Similarly, *Assiniboine* "conclude[d] that a fiduciary duty exists in the *management* of tribal mineral resources." 792 F.2d at 794 (emphasis added).[12] The lower courts are also in

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[11] *Kenai* held that the Department must "take the Indians' best interest into account when making any decision involving [mineral] leases on tribal lands." 671 F.2d at 387. The *Kenai* standard was expressly adopted in the IMLA regulations, 61 Fed. Reg. 35,634, 35,640 (1996), and it applies to lease approval decisions, 25 C.F.R. § 211.3.

[12] *Accord Woods Petrol. Corp. v. Dep't of Interior*, 47 F.3d 1032, 1038 (10th Cir.) (*en banc*), *cert. denied*, 506 U.S. 808 (1995); *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992); *Navajo Tribe v. United States*, 9 Cl. Ct. 227, 238 (1985).

agreement with the court below, Pet. App. 8a, that the IMLA scheme is the legal analog in the mineral context to the timber management regime in *Mitchell II*. *Supron*, 728 F.2d at 1564 ("the statutory and regulatory scheme in *Mitchell II* parallels that involved here"); *Pawnee*, 830 F.2d at 190 (analyzing Indian mineral leasing statutes and regulations, and concluding that "[t]his case is very much like . . . *Mitchell II*."); *Assiniboine*, 792 F.2d at 794; *Youngbull v. United States*, No. 31-88L, 17 Indian L. Rptr. 4001, 4005 (Cl. Ct. 1990) ("In many respects, the case at bar [concerning federal liability for improper IMLA approval decision] parallels the *Mitchell* cases. Both deal with the government's management of Indian resources. Both feature elaborate federal statutory and regulatory schemes governing disposition of Indian resources.") (Rader, J.).

The Government suggests that its management duties are not money-mandating because IMLA's primary goal, to maximize tribal lease revenues, cannot be given "talismanic effect." Pet. at 18 (quoting *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 179 (1989)). However, *Cotton* concerned a state's taxing authority, and "[i]mportant considerations of federalism took precedence over the Secretary's general duty to act on behalf of the tribe." *Burlington Resources Oil and Gas v. Dep't of the Interior*, 21 F. Supp. 2d 1, 4 (D.D.C. 1998). No such principles of federalism are present here, and, absent that circumstance, all authorities (including the Department's own Board of Land Appeals) agree that IMLA's "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).[13] In any event, the Navajo Nation's

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[13] *Accord Supron*, 728 F.2d at 1570; *Kenai* 671 F.2d at 386; *Dawn Mining Co. v. Watt*, 543 F. Supp. 841, 843 n.8 (D.D.C. 1982);

claim does not depend on giving the goal of maximizing lease revenues "talismanic effect"; the Government's conduct subverted IMLA's basic purpose in a most extraordinary and substantial way.

c. The "Causal Link"

The Government's contention that the Navajo Nation here did not allege or prove "the breach of any specific duties imposed by the statutes or regulations giving rise to [the trust] relationship," referred to by the Government as the "requisite causal link," Pet. at 23, simply misstates the record. The Navajo Nation alleged the violation of specific trust duties in the approval of the lease amendments and the events leading to that approval, C.A. App. A35-41, and demonstrated with an unrebutted factual record that the Department violated the following "specific" trust duties imposed by IMLA and its implementing regulations. The Department:

- exercised its approval power under 25 U.S.C. § 396a with no examination of the merits of the transaction or the Navajo's best interests, *see* Pet. App. 26a-27a;
- violated 25 C.F.R. § 211.2 (1985) by compelling the Navajo to negotiate, and by failing to limit and supervise the negotiations;[14]

Burlington Resources Oil and Gas Co., 151 IBLA 144, 156 (1999); *General Crude Oil*, 18 IBLA 326, 329 (1975).

[14] That regulation allowed mineral lease negotiations only if the Indian, not the developer, sought them and required that negotiations generally be concluded in thirty days. C.A. App. A195. The regulation "is designed to prevent overreaching by those negotiating with Indians and to assure that fair market value is obtained for tribal resources." Pet. App. 57a. Here, Peabody sought to prolong the multi-year "negotiations"; the Navajo *opposed* them. *See, e.g.*, C.A. App. A462-A464, A468, A728-A729, A746, A750-A751, A766-A767. This regulatory violation was flagged by the Solicitor's Office and ignored in late 1987, prior to Secretary Hodel's rubber-stamp approval of the lease amendments. *See* C.A. App. A839.

- violated Congress' central purpose in establishing the IMLA trust by deliberately *minimizing* tribal revenues from the Navajo's most valuable, nonrenewable, resource;
- obtained for the trust beneficiary less consideration for its coal than the trustee itself requires for federal coal in violation of federal law, policy, and black letter trust standards;
- knowingly exercised its complete control over royalty adjustments under the lease to undermine Navajo interests, in violation of its IMLA duties[15] and in collusion with the adversary of the trust beneficiary, *see* C.A. App. A746;
- violated specific trust duties of care, loyalty,[16] and candor when operating within the "contours" of the IMLA statutory and regulatory scheme, *see* Pet. App. 11a-12a, 49a.

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[15] The Government seeks to excuse the obvious breach of trust in the Secretary's collusion with Peabody to suppress and conceal a favorable decision on Peabody's administrative appeal of the royalty rate adjustment by observing that that misconduct occurred in a formal administrative appeal governed by the Administrative Procedure Act, not by IMLA. Pet. at 23-24 & n.11. However, the Secretary, as trustee managing tribal minerals, "cannot escape his role as trustee by donning the mantle of administrator." *Supron*, 728 F.2d at 1567. Stated more generally, a "fiduciary cannot turn his responsibilities on and off like a faucet." *In re Diasonics Sec. Lit.*, 110 F.R.D. 570, 574 (D. Colo. 1986) (citations omitted).

[16] The Department's adherence to its duty of loyalty is especially important in its dealings with Indian tribes. *Felix S. Cohen's Handbook of Federal Indian Law* 227-28 (1982); *see generally N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981).

The Court of Appeals had no trouble finding a "causal link," *see* Pet. at 23, between the Department's intentional mismanagement of Navajo coal resources and the damages sustained by the Navajo. *See* Pet. App. 3a, 11a-12a. The Department foresaw the damage to Navajo interests at the time Secretary Hodel suppressed and concealed the well-reasoned Fritz decision, misled the Navajo, and forced the Navajo to negotiate while under severe economic pressures. Asked about a statement in the instruction memorandum drafted by Peabody's lawyers and signed by Hodel that "there would appear to be significant advantages to be derived from the successful renegotiation of the royalty rate," Acting Assistant Secretary Fritz testified: "[t]o everybody other than the Navajo Nation there would be significant advantages, candidly." C.A. App. A1263-64. As the Director of the Office of Trust Responsibilities testified, Hodel instructed Fritz to "don't act, and put these people at arm's length; but I didn't think that that was appropriate . . . I thought that the proper standard for a Trustee is to put your arm around your beneficiary, and together you try to work out a good result. Not to throw them out there and let them get beat up, and then if they are still alive, resuscitate them." C.A. App. A1643-44.

Judge Schall's narrower rationale, that the Secretary's approval of the lease amendments with no economic evaluation violated his trust duties under IMLA, also provides a direct "causal link" between the breach of an enforceable trust duty under IMLA and the damages sustained by the Navajo. Judge Schall's reasoning conforms with all the authorities.[17] It is hornbook law that

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[17] *See, e.g., Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992) ("the Secretary's discretion to approve or disapprove leases . . . must be governed by fiduciary standards and limited by fiduciary duties"); *Cheyenne-Arapaho Tribes v. United States*, 33 Fed. Cl. 464, 468 (1995) ("when DOI leased mineral rights on plaintiffs' lands, it was obliged to use reasonable skill and care in an effort to maximize the benefits, financial and otherwise, that the Tribes would receive from those mineral leases"); *Youngbull*, 17 Indian L. Rptr. at 4005 ("In accord with trust responsibilities, the Secretary has a statutory and regulatory obligation to approve or reject leases according to the best interests of the Indians.").

the federal trust duty under IMLA requires the Department "to review all leases and amendments to leases to assure that the rent and royalty received by the Indian tribes or individual represents the best return that the market will bear." 3 *Am. L. of Mining* § 67.04 [4][d] (1999). The Government's notion that IMLA's approval requirement does not oblige the Secretary to reject improvident lease transactions, Pet. at 19, is pure fancy. The Secretary had done just that when the Navajo had negotiated another sub-12½% coal deal, albeit with a less well-connected coal company. C.A. App. A334; 3 *Am. L. of Mining* § 67.04 [4][d] at 67-17 (1999); *Felix S. Cohen's Handbook of Federal Indian Law* 537 & n.71 (1982). The duty to reject improvident transactions affecting Indian land is one of the cornerstones of federal Indian law, with a history going back to the earliest days of the Republic. *See* 25 U.S.C. § 177; *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-19 (1960). Notably, Congress has allowed for the Navajo Nation to take steps to eliminate the requirement of federal approval for Navajo business site leases, but rejected any reduction of federal control over approval of Navajo mineral leases. *See* Navajo Nation Trust Land Leasing Act of 2000, Pub. L. No.

106-568, Tit. XII, 114 Stat. 2933 (*codified at* 25 U.S.C. § 415(e)(1)).

Similarly, the Department's acknowledged violation of 25 C.F.R. § 211.2 (1985) by forcing the Navajo into multi-year "negotiations," *see* C.A. App. A839, directly caused the damage to the Navajo, as the Department knew it would. *See, e.g.*, Pet. App. 51a-52a; C.A. App. A1263-64, A1667-71.

d. Application of Common Law Standards

The Court of Appeals did not "put[ ] the United States in the shoes of a private, common law trustee for determining *whether* the government has assumed money-mandating obligations to an Indian tribe," as argued by the Government. *See* Pet. at 26 (emphasis added). Rather, the court below first determined, consistent with *Mitchell II*, that the United States assumed money-mandating trust obligations to manage tribal minerals by taking on control of those resources through a comprehensive statutory and regulatory scheme. The Court of Appeals only then measured the Government's *conduct* as trustee with reference to common law trust standards.

The application of common law trust standards to judge the Government's *conduct* as trustee is consistent with both *Mitchell II* and other venerable authorities. This Court has ruled consistently that the Government's "conduct, as disclosed in the acts of those who represent it in its dealings with the Indians, should . . . be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.*, at 297 n.12. "There is no doubt that the United States serves in a fiduciary

capacity with respect to [the] Indians and that, as such, it is duty bound to exercise great care in administering its trust." *United States v. Mason*, 412 U.S. 391, 398 (1973). As the Chief Justice stated for a unanimous Court, "[i]t is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity. *See Seminole Nation v. United States*, 316 U.S. 296-97 . . . " *United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987). *Mitchell II* itself both relied on the common law of trusts, *see* 463 U.S. at 225-26, and also cited with approval numerous decisions expressly applying the *Seminole* standard in imposing monetary liability on the United States for breaches of trust.[18]

Application of the *Seminole* standard specifically in the Indian mineral leasing context is also well established. The Government's duties in this regard are certainly fiduciary in nature. *See Poafpybitty*, 390 U.S. at 373-74 (referring to the "trust obligations" of the Government under IMLA); *Supron*, 728 F.2d at 1563 (applying *Seminole* standard to IMLA decisions); *Assiniboine*, 792 F.2d at 794 (applying *Seminole* and *Mason* standards to IMLA decisions). The application of these standards, with their long established meanings, *see N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981), and a federal Indian law pedigree dating to the earliest years of the Republic, *see Seminole*, 316 U.S. at 296 (relying on, *e.g.*, *Cherokee Nation*

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[18] *See Mitchell II*, 463 U.S. at 226 n. 31, citing, *inter alia*, *Coast Indian Community v. United States*, 550 F.2d 639, 652-53 (Ct. Cl. 1977); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1392 (Ct. Cl. 1975); *Mason v. United States*, 461 F.2d 1364, 1373 n.10 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); *Smith v. United States*, 515 F. Supp. 56, 60 (N. D. Cal. 1978): *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1243 (N. D. Cal. 1973).

v. State of Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831)), is supported by the decisions of this Court and every other court that has addressed the issue.

e. Interplay with Tribal Self-Determination

The Government urges that respect for tribal self-determination dilutes trust duties under IMLA. Specifically, the Petition urges that the Indians' ability to enter into a mineral lease with Secretarial consent lessens the Government's management role. Pet. at 17-18. This is the same argument that the Government made, unsuccessfully, in *Mitchell II*. *See* Brief for the United States, No. 81-1748 (Sept. 3, 1982) at 35 ("the congressional objective [in the timber leasing statute, 25 U.S.C. § 406(a)] was to encourage Indian self-government and Indian control over exploitation of Indian natural resources"). This argument has no more validity in the mineral leasing context than it had in *Mitchell II*. The federal Government's commitment to tribal self-determination in no way compromises its fiduciary obligations under IMLA.

IMLA's only nod to tribal self-determination was to prevent the Secretary from leasing tribal minerals over the Indian's objections. Stated another way, IMLA allows the Indians to make the initial leasing decision if the Government agrees with it. *See* Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 Tulsa L. J. 541, 558-61 (1994). IMLA and its implementing regulations "leave no significant authority in the hand of the Indian tribes." Pet. App. 10a; Royster, at 565 (IMLA "kept tribes largely in the position of passive lessors"). But even if IMLA allowed tribes to exercise significant management authority, the Government presents a false dichotomy.

President Nixon, who forged the Indian self-determination policy, found vigorous enforcement of the trust duty and respect for tribal self-determination to be complementary. President Nixon sought to ensure Federal support for tribal self-determination by emphasizing, not limiting, the trust duty. Focusing on the Indians' "natural resource rights," President Nixon emphasized that "[e]very trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 573.

President Reagan continued the policy of government-to-government respect. President's Statement on Indian Policy, 1983 Pub. Papers 96, 97. But that respect was not to come at the expense of the trust relationship:

> In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Id. at 96. President Bush continued this course. President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662. President Bush affirmed that the federal trust duty in the natural resources context was "an obligation of the highest responsibility and trust," to be judged "by the most exacting fiduciary standards." Statement on Signing the Department of the Interior and Related Appropriations Act, 1991, 26 Weekly Comp. Pres. Doc. 1768, 1769 (1990).

Nor does *Congress* view fulfillment of the trust duty as incompatible with respect for tribal governments. The Indian Self-Determination statute fulfilling President

Nixon's vision makes that clear. *See* 25 U.S.C. § 450n(2). Congress also emphasized this principle in the Indian-Mineral Development Act of 1982 ("IMDA"), 25 U.S.C. §§ 2101-2108. IMDA was enacted "first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources." S. Rep. No. 97-472, 97th Cong., 2d Sess. 2 (1982). The House report explained that 25 U.S.C. § 2103(e), which recognized "continuing" trust duties in the case of mineral leasing,

> simply restates the law as it exists today. If the Secretary, acting as trustee, approves a lease . . . or otherwise acts in relation to the trust resources of an Indian tribe and acts responsibly and within his discretion in doing so, the United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability.

H.R. Rep. No. 97-746, 97th Cong., 2d Sess. 7-8 (1982); *accord* S. Rep. No. 97-472, 97th Cong., 2d Sess. 4-5 (1982).

The Department was not advancing the policy respecting tribal self-government when it secretly conspired with Peabody to cheat the Navajo Nation.[19] Honest consultation with, not deception of, Indian tribes is the cornerstone of the modern federal-tribal relationship. *See, e.g.*, Exec. Order No. 13,175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (2000). Indeed, as the Department recognizes, "maximiz[ing] the economic return on Indian mineral development [helps] to achieve

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[19] Had the Department truly respected tribal decision-making in this case, it would have decided the royalty appeal, not rewarded Peabody's *ex parte* strategy. *See, e.g.*, Pet. App. 40a; C.A. App. A468, A766-67, A2792-93.

greater Indian self-determination." 42 Fed. Reg. 18,083 (1977). Minimizing that return surely undermines tribal self-determination.

f. Inadequacy of Equitable Relief

The Petition urges that the Navajo Nation's sole recourse is an action for equitable relief under the Administrative Procedure Act. *See* Pet. at 24-25. *Mitchell II* rejected this argument, because "by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless." 463 U.S. at 227. That is especially true here, where, unlike timber, the coal resource is non-renewable and the Government concealed its intentional mismanagement of that resource for a decade.

II. THIS CASE PRESENTS NO ISSUE OF GENERAL IMPORTANCE, AND REVIEW WOULD BE PREMATURE.

a. The Petition urges that this case be paired with *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 70 U.S.L.W. 3475 (U.S. April 22, 2002) (No. 01-1067). However, the procedural posture of *White Mountain* is quite different. The Court of Appeals noted there that the Apache had not proved a breach of any federal duty, 249 F.3d at 1381, and it "express[ed] no view as to the existence or nature" of any federal duty, *id.* at 1380. Some of the claims may be premature; others (or all) may be barred by limitations. *Id.* at 1383. Moreover, *White Mountain* involves a *sui generis* act of Congress, and the decision in that case turned on arcane property law concepts unrelated to the body of federal/Indian trust law. *See id.* at 1381-82, and *compare id.* at 1384-85 (Mayer, C.J., dissenting).

By contrast, the Court of Appeals' decision below in *Navajo Nation* is a straightforward application of *Mitchell II*. Therefore, pairing the two cases might have some academic appeal, *see* Pet. at 27, but would add little, if anything, to the comprehensive framework established by the two *Mitchell* decisions.

b. As the Government stresses, the Navajo Nation alleges that the Department's violations of its trust duties resulted in significant damages. If the Court of Federal Claims awards damages on remand and the Government disagrees, this Court will have the opportunity to review the final judgment upon a complete record, and address jurisdiction, liability, and damages. *See Missouri v. Jenkins*, 515 U.S. 70, 83-84 (1995). At this stage, however, review is unnecessary and premature. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (per Scalia, J., on denial of certiorari).

CONCLUSION

The court of appeals' interlocutory decision faithfully applies the *Mitchell* framework. The lower courts are in harmony on all the legal issues. The Petition should therefore be denied, or the judgment below summarily affirmed under Rule 16.1.

Respectfully submitted,

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